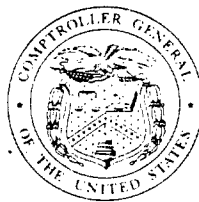


DECISION



11471 PLM II
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195612

DATE: September 21, 1979

MATTER OF: James M. LeVine - [Claim for retroactive compensation]

DIGEST: Employee whose job was abolished because of a reduction in force and who was placed in a lower grade position claims to have continued to perform the duties of the former position after he was changed to lower position. Employee is not entitled to retroactive temporary promotion and backpay in absence of evidence that he was detailed to the higher position regardless of the duties performed.

The issue presented in this case upon an appeal of our Claims Division's denial of a claim for retroactive promotion and backpay is whether an employee whose job is abolished due to a reduction in force and is placed in a lower grade position is entitled to retroactive promotion and backpay if he performs any or all of the functions or duties of the old position. The answer is no.

Mr. James M. LeVine received notice of a reduction in force on May 9, 1972. His position of inspector (heavy duty equipment repair) was abolished and he was placed in the lower grade position of Heavy Mobile Equipment Mechanic effective July 16, 1972. Mr. LeVine contends that he continued to perform the duties of an inspector and foreman and should have been compensated at the WS-10 Transportation Foreman pay scale rather than the Heavy Duty Equipment Mechanic, WG-10 wage scale to which he was assigned from July 16, 1972, through his voluntary retirement effective April 26, 1978. The administrative report supplied by the employing agency, the Naval Postgraduate School, denies Mr. LeVine's assertions about the duties performed by him after July 16, 1972, and states that another person performed the duties of transportation foreman until his retirement in February 1978. DLG 02820

It is a well established rule that an employee is entitled only to the salary of the position to which he is actually appointed, regardless of the duties he performs. Patrick L. Peters, B-189663, November 23, 1977; 55 Comp. Gen. 515 (1975). The proper course of action for an employee to follow in cases of alleged improper position classification is to appeal the

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classification to the Office of Personnel Management. Edward Rothenberg, B-187234, December 8, 1976; 5 CFR Part 511, Subpart F (1978). The fact that after the personnel action which placed Mr. LeVine in a lower grade position he may have continued to perform some of the functions of the higher grade position does not mean that the higher salary rate would be retroactively effective, as an employee is entitled to the salary of the position to which he is appointed even though he may perform the duties of a higher grade position. Jacob Klein, 58 Comp. Gen. _____ (B-194891, August 8, 1979). This rule was upheld by the Supreme Court in United States v. Testan, 424 U.S. 392 (1976).

In Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975), affirmed 56 Comp. Gen. 427 (1977), we held that employees detailed to higher grade positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. In Marie Grant, 55 Comp. Gen. 785 (1976) we ruled that Turner-Caldwell applied retroactively to extended details to higher grade positions. In the Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977), we discussed specifically the relationship of the rule stated therein to the general rule that an employee is entitled only to the salary of the position to which he is properly appointed. We held that, in the limited circumstances of detail in excess of 120 days an employee could receive backpay, but that rule was predicated upon the employee being detailed, formally or informally to an existing position. Thus, although an employee may not be allowed backpay for the performance of duties which should be classified at a higher grade, he may be granted backpay if he is detailed to a higher grade position and retained in that detail for a period in excess of the time permitted in the mandatory regulations of the Civil Service Commission. Donald P. Konrady, B-193555, January 26, 1979.

The Civil Service Commission promulgated implementing guidance concerning Turner-Caldwell, in Bulletin No. 300-40, dated May 25, 1977, subject: GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs, B-183086, September 7, 1978. Paragraph 4 of that bulletin states: "For purposes of this decision, the position must be an established one, classified under an occupational" AGC00013

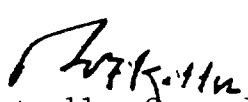
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standard to a grade or pay level." (Emphasis in original.) This statement emphasizes that the crucial aspect in the Turner-Caldwell line of cases is that the position or duties to which an employee is detailed be those of an established and classified position. Patrick J. Fleming, B-191413, May 22, 1978.

There is some dispute about whether Mr. LeVine performed the duties of a higher grade position after the reduction in force which abolished his position and placed him in the lower grade position. The agency asserts that the duties claimed to have been performed by Mr. LeVine were being performed by another person. Mr. LeVine counters that the individual holding the higher position did not perform the duties assigned and that therefore those duties were performed by him. We decide cases involving claims against the Government on the basis of the written record. The claimant has the burden of proof of establishing the liability of the United States and the claimant's right to payment. 4 CFR Sec. 31.7. Therefore, if the written record before us presents a material dispute of fact that cannot be resolved without an adversary hearing, we are required to deny the claim because the claimant has failed to establish his claim. Victor C. Spencer, B-194289, June 27, 1979.

For the reasons stated, there is no authority under Turner-Caldwell, to grant Mr. LeVine retroactive temporary promotion and backpay.

Accordingly, the Claims Division disallowance of Mr. LeVine's claim is sustained.


Deputy Comptroller General
of the United States